In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1136

MURRAY TILLMAN, ET AL., PETITIONERS

v.

HEATON-HAVEN RECREATION ASSOCIATION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The United States submits this memorandum in support of the petition for a writ of certiorari.

INTEREST OF THE UNITED STATES

The United States has a continuing interest in, and responsibility for, eradicating discriminatory practices which deny to the members of any group, on account of their race, access to residential communities, to places of public accommodation or to community recreational facilities. This is especially so with respect to practices which deny to individuals, on the basis of race, the same benefits that are ac-

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corded to their neighbors in the community in which they reside, thereby encouraging segregated housing arrangements. See Section 1 of the Civil Rights Act of 1866, 42 U.S.C. 1982; Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a; and Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.* Our participation here is in accordance with the government's participation in such cases as *Palmer* v. *Thompson*, 403 U.S. 217; *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229; *Daniel* v. *Paul*, 395 U.S. 298; *Hunter* v. *Erickson*, 393 U.S. 385; *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409; *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715; *Boynton* v. *Virginia*, 364 U.S. 454; and *Shelley* v. *Kraemer*, 334 U.S. 1.

REASONS FOR GRANTING THE WRIT

By a divided vote, the court below (Pet. App. B-1 to B-23) has sanctioned the exclusion, solely on account of race, from membership in and use of a neighborhood swimming facility—"open to bona fide residents (whether or not homeowners) of the area within a three-quarter mile radius of the pool" (Pet. 3)—of black residents of the community served, and of black guests of white residents who have obtained membership. The decision is premised on a finding that the Wheaton-Haven Recreation Association is a "private club" within the meaning of the public accommodations provisions of Title II of the Civil Rights Act of 1964 (42 U.S.C. 2000a(e)), and thus is exempt from that Act's requirement of non-discrimination, and on a holding that the 1964 public accommodations provisions were intended to limit whatever relief

might otherwise have been available to petitioners under the Civil Rights Act of 1866 (42 U.S.C. 1982).

In both respects, we think the court of appeals erred. Its decision is in direct conflict with this Court's decision in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, and is contrary to the Fifth Circuit's recent holding in *Sanders* v. *Dobbs Houses, Inc.*, 431 F. 2d 1097,, 1100 (C.A. 5). It raises important questions concerning the proper construction and application of the above statutory provisions which this Court should resolve.

1. In *Sullivan* v. *Little Hunting Park, Inc., supra* this Court held that a recreational facility similar to the one involved here, which is open to all residents in a given geographical area, was not a private social club. There, every adult owning or leasing a house in the prescribed area was eligible for membership, subject only to the approval of the board of directors. "There was no plan or purpose of exclusiveness" (396 U.S. at 236). The Court ruled that in those circumstances the denial of membership to a black tenant, solely on the ground of race, "was clearly an interference with [his] right to 'lease'" (396 U.S. at 237), and hence violated the mandate of 42 U.S.C. 1982 that "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

The court below purports to distinguish *Sullivan* essentially on the ground that membership in the

Wheaton-Haven facility is not tied to the purchase or lease of a home in the geographic area—*i.e.*, is not "unequivocally tied to the land" (Pet. App. B–15)—but is open to "persons who actually reside within an area described by a circle three-quarters of a mile in radius with its center at the pool" (Pet. App. B–16). Even though membership is thus an incident of "residence", the majority below reasoned that it could not be deemed "incidental to, or part of, the rights acquired directly with the acquisition of possessory rights" (Pet. App. B–16) within the designated three-quarter-mile radius. Rather, it viewed the Wheaton-Haven facility as affording "an area preference, and nothing more" (*ibid.*), pointing to the fact that, subject to a limit of thirty percent of total membership, persons who reside outside the prescribed area can obtain membership on recommendation of a member.

In our view, the court's distinction unjustifiably exalts form over substance, and seriously undermines the essential thrust of this Court's decision in *Sullivan*. As the dissent below properly points out, petitioners "Dr. and Mrs. Press base their claim on ownership of real property situated less than three-quarters of a mile from the pool" (Pet. App. B–26). As an incident of that ownership—being residents of the community—they are entitled to membership in the pool no less than the tenant in *Sullivan* who based his claim on his right to lease. In the words of the dissent below (Pet. App. B–26): "Section 1982 protects the rights to 'purchase' and 'hold' property no less than the right to 'lease'." Its fundamental pur-

case should not be defeated by giving it the narrow construction adopted by the majority below. See *Sullivan* v. *Little Hunting Park, supra*, 396 U.S. at 237.

Nor should it make a difference that, to a limited extent, membership is also available to persons residing outside the geographic area. Petitioners correctly point out (Pet. 12) that the same situation existed in *Sullivan* with respect to the authorized membership of Little Hunting Park. In neither instance does that circumstance justify characterization of the facility as a private club. Membership which, as here, may be transferred by the homeowner through use of a first option at the time he sells his home,[1] and which is based essentially on geography, is the very antithesis of the private social club. See *Nesmith* v. *YMCA of Raleigh, N.C.*, 397 F. 2d 96, 102 (C.A. 4); and see *United States* v. *Richberg*, 398 F. 2d 523 (C.A. 5); *Rockefeller Center Luncheon Club, Inc.* v. *Johnson*, 131 F. Supp. 703 (S.D.N.Y.). There has been no attempt here to achieve any sort of compatibility of background or

[1] Under the Wheaton-Haven by-laws (Pet. 4): "If a member who is also a homeowner sells his property and resigns his membership, his purchaser receives a first option to purchase his membership, subject to the approval of the Board of Directors." While this is different in form from the Little Hunting Park's transfer of membership by assignment, there is no substantive difference. Nor do we agree with the court below that, because membership rolls are not fully filled, the option is essentially valueless (Pet. App. B–11 to B–13). At the time petitioners might decide to sell, the membership rolls could well be full, thus making the membership option significantly more valuable to the purchaser than it might be if the sale were to occur at the present time.

interest, save geography. See *Daniel* v. *Paul*, 395 U.S. 298, 301–302.

2. In concluding that the Wheaton-Haven facility is covered by the "private club" exemption in the 1964 Act, the majority below stated that "'[t]his exception to the ban on racial discrimination of necessity operates as an exception to the Act of 1866, in any case where that Act prohibits the same conduct which is saved as lawful by the terms of the 1964 Act'" (Pet. App. B–6). This flies squarely in the face of this Court's statement in *Sullivan* v. *Little Hunting Park, Inc.*, *supra*, 396 U.S. at 237:

> We noted in *Jones* v. *Mayer Co.*, that the Fair Housing Title of the Civil Rights Act of 1968, 82 Stat. 81, in no way impaired the sanction of § 1982. 392 U.S. at 413–417. What we said there is adequate to dispose of the suggestion that the public accommodations provision of the Civil Rights Act of 1964, 78 Stat. 243, in some way supersedes the provisions of the 1866 Act. * * *

Accord: *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 416–417 n. 20; *Sanders* v. *Dobbs Houses, Inc.*, 431 F. 2d 1097, 1100–1101 (C.A. 5).[2]

3. Accordingly, the decision below merits review by this Court. If Wheaton-Haven can properly exclude Negroes systematically from its membership, the protections afforded by 42 U.S.C. 1982, as interpreted by this Court in *Sullivan*, will be significantly diluted. Under the guise of affording "residence" in a par-

[2] In *Sanders*, the Fifth Circuit held that the specific remedies in Title VII of the Civil Rights Act of 1964 do not preempt the general remedial language of 42 U.S.C. 1981.

ticular geographic area "an area preference, and nothing more" (Pet. App. B–16), a Negro can be given the same rights of ownership of real property as a white citizen, but can be precluded from enjoying some of the incidents thereof on the basis of his race.

The statutory pledge to the Negro in Section 1982 that he shall enjoy "the same right * * * as * * * white citizens" is not so empty (see *Jones* v. *Alfred H. Mayer Co., supra*, 392 U.S. at 443) that it can be satisfied if Negroes are allowed to buy or rent homes, but are, in significant part, barred from the neighborhood by being denied access to a community recreational facility which is, for white persons, a valuable incident of the possession of real property there.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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